

Before the Personnel Commission
Los Angeles Unified School District

In the Matter of)	
)	
ROSA XXXXXX (EN588479))	Findings and
)	
Petitioner,)	Recommendation
)	
And)	of the
)	
LOS ANGELES UNIFIED SCHOOL)	Hearing Officer
DISTRICT,)	
)	Case No. 0837
Respondent,)	
)	
(Appeal from 20-day Suspension.))	
_____)	

Hearing Officer: Arturo J. Morales, Esq.

Hearings: April 14, May 18, 2005
Los Angeles, California

Appearances:

Petitioner: Kurt A. Stiefler
Attorney at Law

Respondent: Lisa Berman-Lench
Assistant General Counsel

Submitted to the
Hearing Officer: June 8, 2005

INTRODUCTION.

This matter involves the appeal of Rosa XXXXXX from a twenty-day suspension for using inappropriate language, speaking on a cell phone while driving, not picking up student passengers, taking a parent complaint letter, and intimidating students. The decision of the Hearing Officer is as follows.

I.

STATEMENT OF CHARGES

The following causes were asserted against Petitioner Rosa XXXXXX:

- I. Inattention to or dereliction of duty.
- II. Willful or persistent violation of, or failure to enforce, regulations or procedures pertaining to health and safety.
- III. Any other failure of good conduct tending to injure the public service.
- IV. Willful or persistent violation of, or failure to enforce, regulations or procedures pertaining to health or safety.
- V. Any other failure of good conduct tending to injure the public service.

These causes were based on the following charges:

- 1. During the period beginning on or about September 2, 2003 through September 10, 2003, Mr. Ms. XXXXXX, on one (1) or more occasions:
 - a. Used inappropriate language in the presence of students o board her District assigned bus.
 - b. Used a cellular telephone while driving her assigned bus.
 - c. Without authorization, left at least two (2) children waiting at a bus stop.
- 2. On or about September 10, 2003, Ms. XXXXXX:
 - a. Without authorization, took a parent complaint letter from the desk of Mr. Karl Morris, area bus supervisor.

- b. Used the above referenced letter to intimidate the students on board her bus into not telling their parents about activities on the bus.

II.

BACKGROUND

On September 2, 2003, Petitioner Rosa XXXXXX was operating a District school bus on the first day of school. The bus was at one point parked at the curb at a bus stop. The mother of a student Justine M. pulled in front of the bus, parked, and let her daughter out of her car to enter the bus. However, as the mother was watching and as Justine was just outside the bus door, the bus pulled away and left Justine at the curb.

On the same day, another student, Esther A., tried to enter the bus operated by Ms. XXXXXX. This student lacked a bus pass but had a letter from the District Transportation Department which should have permitted the student to ride on the bus. After some discussion between Petitioner and the mother of Esther A., Petitioner left the bus stop without the Esther and Esther was left to find another way to school..

During the next several days, Petitioner operated the bus on the same route as described above. During this time, several students assert Petitioner used profanity including the work “f***” and the phrases “shut the f*** up” and “Oh you sixth graders give me such a f***ing headache.” Petitioner denies making these statements except that she may have used profane words in describing what words may not be spoken.

The District also asserts that during the same time frame, the Petitioner used her cell phone to make and receive calls while the bus was in motion. The District prohibits this as unsafe and in violation of District policy. Petitioner denies these allegations.

The mother of Justine M. wrote a letter to the District complaining about her daughter's treatment by Petitioner. Subsequently, Petitioner's supervisor met with her to discuss the complaint. When the supervisor was occupied by another matter, Petitioner took the complaint and made a copy of it. Petitioner returned the complaint letter to the supervisor's desk but did not mention that she had copied the letter. At no time did Petitioner ask for permission to copy the letter.

Later Ms. XXXXXX stopped the bus while carrying students on the bus and she showed students the letter. She then allegedly told students not to tell their parents what had happened on the bus because she would find out.

III.

POSITIONS OF THE PARTIES

Petitioner's Positions

Allegation No. 1: The Failure to Pickup Students

Petitioner did not intentionally leave behind Justine M. or ignore her mother. If she left behind Justine M., it was because she did not see her. If she failed to speak to Justine M.'s mother, it was also because she did not see her.

Regarding the second student allegedly left behind, Petitioner discussed the matter with the student's mother. The mother chose to drive the student to the school as opposed to sending her daughter to ride on the bus. Petitioner denies that she denied the child access to her bus.

Allegation No. 2: The Wrongful Use of Profanity

Ms. XXXXXX did not curse at a student. Rather Petitioner uttered curse words in the course of explaining what words were unacceptable for usage on her bus. Claimant had to use curse words to explain to students what unacceptable language was.

Allegation No. 3: Use of a Cell Phone in a Moving Bus

Petitioner does not deny that she brought a cell phone onto her bus. She asserts that the District knew that drivers brought their phones on the buses and even requested that drivers give their numbers to management in order that management be able to call them. Her use of a cell phone was in accord with the District's unstated policy.

Allegation No. 4: The Wrongful Taking of the Complaint Letter.

Petitioner's supervisor on his own initiative showed her the complaint letter. The supervisor never told Petitioner she could not have a copy of the document. There was no District rule that barred Ms. XXXXXX from copying the letter. Moreover, in any event, Petitioner would eventually have been given a copy of the letter if any discipline was taken.

Allegation No. 5: The Use of the Complaint Letter to Intimidate Students

Petitioner did not show the letter to the students on her bus. She did not try to use the letter to intimidate the students. While she engaged in discussion concerning the letter's content, this was only to find out if she needed to make any changes in her actions on the bus. In no way, did she try to single out for intimidation Justine as the daughter of the writer of the letter.

The District's Position

Allegation No. 1: The Failure to Pickup Students

Ms. XXXXXX saw Justine M. arrive late at the bus stop. Ms. XXXXXX decided not to pickup Justine but rather to ignore her and her mother rather than to wait for Justine to board the bus.

Allegation No. 2: The Wrongful Use of Profanity

Petitioner had a practice of using profanity in front of the students. She used the terms "f***ing" and . At minimum, claimant used profane language in describing the language that could not be used on the bus.

Allegation No. 3: Use of a Cell Phone in a Moving Bus

The District made it clear to drivers that cell phones were not to be used on moving buses. If a driver received a call while operating the bus, the driver was supposed to pull over to the side of the road. The District has Petitioner's cell phone records showing an inordinate number of calls received and made during working hours.

Allegation No. 4: The Wrongful Taking of the Complaint Letter.

Whether Petitioner could have eventually obtained the complaint letter as part of the disciplinary process is beside the point. When Petitioner took the letter for copying, Petitioner did not have permission to do so. Petitioner should have known that taking a letter off of a supervisor's desk was improper.

Allegation No. 5: The Use of the Complaint Letter to Intimidate Students

Petitioner showed students the complaint letter in order to show them that no complaints that they or their parents might make was truly confidential. The effect was to discourage complaints. Ms. XXXXXX should have known that this was improper.

IV.

ANALYSIS OF THE EVIDENCE

A. The Failure to Pickup Students

In support of the charge that Petitioner improperly left students behind, the District called to testify two students, Esther A. and Justine M., and one parent, Justine's mother. Justine and her mother testified that on the first day of school in the 2004 – 2005 school year, they drove to the location where Justine could be picked up. They saw a school bus waiting. Justine exited the vehicle and ran to the bus. Then, despite the fact that Petitioner saw Justine moving towards the bus and Justine's mother waving for the bus to stop, Petitioner drove off to her next stop. Justine's mother then transported Justine to school.

Esther testified that on the first day, she was also left behind. As she tried to enter the bus, Petitioner asked for a bus pass but Esther did not have one. Petitioner was not allowed to enter the bus even though Esther's mother presented a District letter that should have allowed the student to ride on the bus.

Petitioner testified regarding the first day of school for 2004-2005. That day her bus was overloaded and the day was difficult. She did not know by sight who her student-passengers were. She knew she had to pickup students or there would be a complaint. She did not intentionally leave behind Justine behind. She did not see her.

Regarding Esther, she spoke to Esther's mother and they discussed whether Esther could ride on the bus. The mother chose to drive Esther to school.

The District's evidence was credible. Esther and Justine testified with sincerity. While the girls' testimony was not perfect in all its details and there was some confusion about how long Petitioner drove the route in question, the essence of the girl's testimony is accepted as true. Thus, it is found that Petitioner improperly failed to transport two students to school in September of 2004.

Moreover, Justine's testimony was supported by her mother's testimony. The mother saw the bus pull away when Justine was clearly visible. The mother had no reason or incentive to press a false charge. While Justine's mother had a connection to an important local political body, this connection does not supply motivation to fabricate. Meanwhile Petitioner's cross-examination was not effective in attacking the credibility of the mother.

On the other hand, Petitioner's credibility is suspect. Petitioner had every reason to do everything possible to avoid the discipline. She is a long term employee with a job to protect. She also already has progressive disciplinary action on her record.

Petitioner's description of her conversation with the mother of Esther does not ring true. Petitioner's version of the encounter is that Esther's mother was present when Esther tried to board the bus. But when Esther actually tries to board the bus, Petitioner stops her for lack of a bus pass. Then Esther's mom and Petitioner discuss the situation and the mother, according to Petitioner, chooses to drive her daughter to school herself.

There are two problems with this scenario. First, it was established during the testimony that students with transportation letters but no bus passes were supposed to be allowed to use the buses. It was then inappropriate for Petitioner to be giving Esther and her mother such a hard time about entering the bus.

Second, the idea that the mother would choose to drive her daughter to school after taking the trouble to take her to the bus stop does not make sense. The mother would have wanted her child to board the bus. If a parent were finally allowed to have his or her child board the bus, he or she would have taken advantage of the offer and not chosen to drive the child to school.

B. Use of Profanity

There was testimony from students as to Petitioner's usage of profanity on her bus. Esther testified that in response to students acting up and acting noisily, the Petitioner stated angrily, "shut the f*** up."

Student Jessa testified that Petitioner used profanity on the bus five times per week. She also called the students stupid. Student Justine also heard Petitioner utter profanity.

Petitioner denied using profanity towards students or in anger. She did admit using profanity in describing for students language that was prohibited. She also described a chaotic first week at school

The students are believed that Petitioner used profanity in the bus. This is based on their credible demeanor and testimony. However, the Petitioner's use of profanity appears overstated. Thus, it is decided that Petitioner's use of profanity is significantly less than that testified to by Jessa.

C. Cellphone Usage

The District put on evidence that Petitioner engaged in repeated and extensive use of her cell phone while operating her bus. Any such action would violate the bus drivers manual.

In large part, the District relies upon Petitioner's cell phone records and inferences that can be drawn from them. The records show numerous cell phone calls being made and received by Petitioner during hours she was supposed to be working.¹ For example, on September 2, 2003, there were twelve calls to or from Petitioner during her scheduled work hours. On September 3, 2003, Ms. XXXXXX received or made nineteen calls. For September 8, 2004, she made or received sixteen calls. Thus, Petitioner had a substantial number of calls which she could have taken or made while operating her bus during working hours.

Petitioner's counsel ably tries to point to deficiencies in the evidence. He argues that the cell phone records do not pin down Petitioner's location at the time the calls were made. Petitioner offers a theory that when she was using her cell phone, she was parked at the curb, in the process of pulling over or waiting for students. Thus, the phone records, he asserts, do not resolve this issue.

The phone records need to be considered in connection with the testimony of the student witnesses. The students each corroborate that Petitioner was on her cell phone while the bus was moving. Again, the students are young and there are some inconsistencies but the general thrust of testimony—Petitioner was on the phone while the bus was moving—is accepted as true.

D. Copying of the Complaint Letter

¹ Petitioner's schedule varied with the day and included the following relevant days: September 2, 2003, September 3, 2003, September 8, 2003,

Petitioner admitted to copying the complaint letter sent by Justine's mother. Petitioner takes the position that she did nothing wrong and that Petitioner's supervisor showed her the letter. Petitioner misses the point.

By her conduct Petitioner exhibited that knew she was doing something wrong. She waited until the supervisor was distracted by other matters to copy the item. She could have tried copying the document when the supervisor was aware of what she was doing.

She never told the supervisor that she wanted a copy or that she had made a copy. Telling the supervisor that a copy had been made would have been the natural next step but Ms. XXXXXX never did it.

What Petitioner did was inappropriate. It was a form of misappropriation—the taking of property that was not one's own. It is no excuse that eventually Petitioner would have obtained a copy. At the time when Petitioner took the copy, she simply had no right to it.

It would be equally erroneous to overstate this offense. This was not a literal theft: the supervisor put the document in Petitioner's hands; and she did not break into a filing cabinet or some other egregious act of theft. Nor did Petitioner violate a promise or pledge to maintain the confidentiality of the document. Rather Petitioner made a copy of a document for which she had no permission to take.

E. Intimidation of the Students with the Complaint Letter

Petitioner having taken the complaint letter and copied it as discussed above, the next issue is whether she made an improper use of the copy? In Petitioner's written closing argument, she asserts that copied the letter "because it concerned a potential

disciplinary matter” and to help her “maintain a working relationship of sorts with the children.” On the other hand the District asserts that Petitioner copied the letter for use in intimidating the students. In other words she was sending a message that if a student complained about her, she would find out who that person was.

Considering Petitioner’s explanation first, there are problems with it. Ms. XXXXXX did not need the letter to respond to disciplinary charges. She had faced such charges in the past without copying employer documents. Moreover, the letter did not contain such complicated material that she could not have remembered it without the actual document.

Petitioner’s other excuse is that she copied the letter to help her continue a “working relationship” with her student passengers. The idea is that if the driver knows what his passengers are upset about he or she can use the information to make changes to his or her behavior. This does not ring true.

The complaint letter sets forth a parent’s complaint that her child was left behind at a bus stop and that the driver used profanity. One does not need to copy the letter to understand that parents don’t want their children left behind at their pickup point.

The District’s position is that the letter was used to intimidate the student passengers. However, the District never established that Petitioner ever displayed to the students the actual letter. Moreover, the Petitioner was not shown to have ever mentioned the mother who had written the letter or the student who was the subject of the letter.

In this context, the finding of the Hearing Officer is between the positions of the parties. Ms. XXXXXX is found to have used the letter to emphasize her denials and in her insecurity about possible discipline. She is not found to be using the letter specifically

against Justine M. and her mother. For her actions regarding this charge, a suspension of three days is found appropriate.

V.

CONCLUSIONS OF LAW

The Districts original imposition of a twenty-day suspension rests upon establishing five separate and distinct charges. The District has established the validity of each of the charges. However, as discussed infra, not all of the charges were established to the extent alleged in the original statement of charges. In this context, it concluded that Petitioner receive a sixteen day suspension. Such a suspension is sufficient to impress upon Petitioner the gravity of what she did and at the same time reduces the penalty to reflect that the District was not completely successful in establishing the original allegations.

RECOMMENDATION

Based upon the reasoning set forth above, it is recommended that the twenty-day suspension imposed by the District be reduced to a sixteen-day suspension. The District should reimburse Petitioner for four of the twenty days pay previously deducted from her pay.

Dated: September 18, 2005

Respectfully Submitted,

Arturo Morales
Hearing Officer